

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. CHESTER WAYNE WALTERS

**Criminal Court for White County
No. CR599**

No. M2003-03019-CCA-R3-CD - Filed November 30, 2004

ORDER

The defendant has filed a petition to rehear pursuant to Rule 39, T.R.A.P., asserting that in our opinion filed on October 4, 2004, we misconstrued the Tennessee Supreme Court's statement in State v. Marcum, 109 S.W.3d 300, 304 (Tenn. 2002), that an attempt instruction was not required for the rape charge because there was no evidence of an attempted rape, only the completed crime. He points out that we said that Marcum held that an attempt instruction was not required because proof of the completed crime existed. The defendant correctly notes that Marcum did not discuss aggravated sexual battery and Class B misdemeanor assault as lesser included offenses of rape, and he argues again that the failure to instruct on them constituted reversible error.

We acknowledge that our opinion did not state Marcum's holding exactly, but we were aware of the import of Marcum and our decision regarding an attempt was based on our conclusion that there was only proof of the completed crime, not an attempt. Regarding the offenses of aggravated sexual battery and Class B misdemeanor assault, we concluded in the opinion that failure to instruct on them was harmless error. The defendant has offered nothing new to question this conclusion. Thus, we deny his petition to rehear.

The defendant also requests that we vacate an order entered by the trial court after our opinion was filed by which it purportedly modified the defendant's sentences pursuant to the opinion. We note that the trial court has no jurisdiction to enter new judgments until the mandate issues in the case.

Finally, we have reconsidered our rulings regarding Blakely v. Washington and have concluded that Blakely error is subject to constitutional harmless error analysis. Although such does not alter the result in this case, we withdraw the opinion filed on October 4, 2004, and replace it with an opinion that deals with the harmless error issue.

PER CURIAM
(Tipton, Ogle, Wedemeyer, JJ.)